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IN THE SUPREME COURT OF THE ~~UNITED STATES~~

October Term, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BILLY LEE CHADD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. DOES THE "RIGHT TO MAKE A DEFENSE" AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND FARETTA v. CALIFORNIA (1975) 422 U.S. 806, NECESSARILY INCLUDE A FUNDAMENTAL RIGHT TO ENTER THE PLEA OF ONE'S CHOICE?

2. CAN A STATE ELIMINATE THE FUNDAMENTAL RIGHT TO ENTER THE PLEA OF ONE'S CHOICE BY CONDITIONING ENTRY OF THE PLEA ON THE CONSENT OF DEFENSE COUNSEL?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Petitioner, the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this proceeding January 19, 1981, reversing the judgment of death and guilty pleas on which the judgment was based.

OPINIONS BELOW

The opinion of the California Supreme Court is reported as People v. Chadd (1981) 28 Cal.3d 739. A copy of that opinion appears as appendix A to this petition. The order of the California Supreme Court issued on March 2, 1981, refusing to grant a rehearing in this case, and denying petitioner's motion to stay the remittur, appears as appendix B to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3) to review a judgment of the California Supreme Court, which judgment was entered January 19, 1981. The judgment of the California Supreme Court became final for purposes of this Court upon denial of the Request for

Rehearing by the California Supreme Court on March 2, 1981. (Market Street R. Co. v. Comm'n. (1945) 324 U.S. 548, 550-552.) Thus, the instant judgment is a final decision rendered by the highest court of the State of California, interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "[SECTION 1.] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

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United States Constitution, Amendment XIV, in pertinent part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

California Penal Code section 1018, in relevant part:

> "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. . . ."

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California Penal Code section 190.2, in pertinent part:[1/]

> "The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:
>
> ". . . . . .
>
> "(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:
>
> ". . . . . .
>
> "(3) The murder was willful, deliberate, and premeditated and was committed during the

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1. Penal Code section 190.2 has been amended since the filing of the information in this case. The amendments, however, do not affect the provisions under which respondent was prosecuted.

commission or attempted commission of any of the following crimes:

"(i) Robbery, in violation of Section 211;

". . . . . .

"(iii) Rape by force or violence in violation of Subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

". . . . . .

"(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree."

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California Penal Code section 190.4, in pertinent part:

"(a) . . . . . .

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

". . . . . .

"(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people."

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STATEMENT OF FACTS

On the night of July 26, 1974, respondent was driving around the City of San Diego looking for someone to rob. At about midnight he saw a house with its lights on. He parked his car, walked up to the front door and knocked. Thirty-year-old Patricia Franklin answered. Respondent was not able to go through with the robbery. He asked for directions and returned to his car. He drove around the block "cussing" to himself for not having enough nerve, then returned to the Franklin residence. (RT 1262-1263; exh. 19-C, p. 30; exh. 40-A, pp. 3, 10-11.)[2/]

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2. "RT" refers to the 2,000-page trial transcript in this case; exhibit 19-C is Chadd's handwritten account of the murders he committed; exhibit 40-A is a written transcript of Chadd's statement to police. Exhibits 19-C and 40-A were before the jury.

Respondent sat outside Ms. Franklin's house for 30 to 45 minutes, then put on a pair of gloves and armed himself with a nine millimeter automatic pistol. He went to the front door. It was locked. He went to the back door. It was open so he went in with his gun extended in front of him. He made his way into the living room, then a hallway. There, he confronted Patricia Franklin. Ms. Franklin was naked, having just gotten out of the bathtub. (Exh. 19-C, p. 31; exh. 40-A, p. 3.)

Respondent told Ms. Franklin he was going to rob her. He made her get him a knife from the kitchen, then took her into the bedroom and cut down venetian blind cords. Ms. Franklin was ordered to lay on the bed where her hands and feet were tightly tied. As she pleaded he not hurt her, he orally copulated and raped

her. He then ransacked the house, taking a total of $60.

While ransacking the house, respondent decided to kill Ms. Franklin. He returned to the bedroom where he gagged her and repeatedly raped, sodomized and bit her. At one point she seemed to pass out so he stopped long enough for her to revive. Then, as he engaged in intercourse with Ms. Franklin, he, in a manner consistent with torture, jabbed her throat with the knife. Respondent also inflicted a one and one-half to two inch wound. He stopped only when he was sure she was dead. (RT 1250, 1265-1267, 1285-1286, 1313, 1488-1489, 1491-1495; exh. 19-C, pp. 32-37; exh. 40-A, pp. 4-10.) Ms. Franklin's body was found the next morning by her roommate. She had died as a result of strangulation and stab wounds to the neck. (RT 1493-1494, 1501.)

On February 15, 1978, respondent was approaching a bus stop when he met Linda Hewitt. Ms. Hewitt, who was also trying to catch a bus, was pushing her 18-month-old son in a stroller. She was trying to locate the bus which would take her to her housekeeping job. Respondent offered to direct her to the house, then later pick her up in his car. She agreed. (Exh. 19-C, pp. 77-78; exh. 40-A, pp. 30-33.)

When they arrived at the home of Ms. Hewitt's employer, it was empty. Respondent followed Ms. Hewitt upstairs to a bedroom. When she resisted his sexual advances, he began to choke her. He made her remove her clothing and lay down on the bed. He raped her, ordered her to orally copulate him, and sodomized her. He pushed on her eyes with his thumbs until she yelled. When she

protested, he grabbed her child by his hair and threatened to break his neck. Ms. Hewitt therefore submitted to additional sexual assaults. However, respondent had decided to kill her because he believed she would call the police. (RT 1067-1968, 1083, 1085; exh. 19-C, pp. 78-80; exh. 40-A, pp. 33-36.)

Respondent had Ms. Hewitt get dressed and go downstairs where he tied and gagged her, took money from her purse, and then told her he was going to kill her. As her child watched, he choked Ms. Hewitt, then stabbed her in the throat until she was dead. (Exh. 19-C, pp. 77, 80-81; exh. 40-A, pp. 36-38; RT 1194). He left Ms. Hewitt's body on the floor where it, and her child, were found by her employer's young children and police. (Exh. 19-C, pp. 77-78; exh. 40-A, p. 38; RT 1074-1976.)

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STATEMENT OF THE PROCEEDINGS BELOW

1. PROCEEDINGS AT TRIAL

In a ten-count information filed on January 25, 1979, the District Attorney for San Diego County charged respondent with the first degree murders of Patricia Franklin (count 1) and Linda Hewitt (count 6). As to Ms. Franklin, he was also charged with rape (count 2), sodomy (count 3), robbery (count 4) and burglary (count 5). As to Ms. Hewitt he was charged with rape (count 7), sodomy (count 8), oral copulation (count 9) and robbery (count 10.)

With regard to the murder of Ms. Hewitt (count 6), special circumstances were alleged, making the crime a capital offense under California law. (Cal. Pen. Code, § 190.2, subds. (c)(3)(i), (c)(3)(iii), (c)(5).)

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On the day set for respondent's preliminary hearing, he requested that he be permitted to plead guilty to the charges:

> "THE DEFENDANT: Well, sir, to alleviate any problems that we might head into in the future and cut down a lot of time the Court is going to be taking up with the Preliminary Examinations and trials and motions and all that stuff, it is my intention to plead guilty to the charges anyway and my attorney -- I respect his position saying that he would not allow me to plead so I would request that he be discharged at this time that I may represent myself and go ahead and enter a plea of guilty.
>
> "THE COURT: Well, the problem is, of course, Mr. Chadd, while you have a right to represent yourself as enunciated by the Supreme Court, to accomplish what you desire or indicate that you desire to do by yourself creates such a cumbersome problem on the court that you are not accomplishing what you want to do. Your desires in this matter would work much more smoothly if you are represented by competent counsel and Mr. Pitkin is a very high caliber counsel and can guide you through this much easier than trying to do it by yourself.

"THE DEFENDANT: Well, your Honor, I understand that with all due respect to Mr. Pitkin's ability and the Court for appointing him to me, with him working as my attorney, I wouldn't be able to plead as I want and he has already stated the fact that if I did plead guilty, that it would be immediately reversed on appeals due to incompetency of my attorney for allowing me to plead guilty in the first place. I want to get this over with as soon as possible." (RT (Jan. 12, 1979) 5-6.)

Respondent was told he could not plead guilty until he reached superior court. He stated:

"THE DEFENDANT: Very well.

"THE COURT: Do you want to proceed with this?

"THE DEFENDANT: Until we reach Superior Court, I guess that's the way I have to go." (RT (Jan. 12, 1979) 7.)

Respondent then waived his preliminary hearing.

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On January 26, 1979, respondent appeared in the San Diego County Superior Court. His counsel told the court that respondent wished to plead guilty to the face of the complaint and relieve him as counsel. Counsel stated he had advised respondent against such a move, but was satisfied he had the right. Counsel requested the court inquire as to respondent's competency to make such a decision. (RT (Jan. 26, 1979) 1.)

The prosecutor stated it was his understanding respondent did not necessarily wish to relieve his counsel but simply wished to plead guilty. The difficulty was that counsel had advised him not to plead and would not consent to the plea. (RT (Jan. 26, 1979) 2.)

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Trial counsel told the court he believed respondent wanted to plead guilty to "commit suicide." The court then inquired:

> "THE COURT: Mr. Chadd, your counsel has indicated that you want to commit this suicide. You want to plead guilty and have the Court help you in doing that. What about that?
>
> "THE DEFENDANT: Your Honor, it's true, I did attempt suicide. I have given serious consideration to the consequences of the trial, the outcome, what it might be. I feel the death penalty would be, for all intents better for me.
>
> "If the State of California can't, and I don't receive the death penalty, then I have got another shot in Nevada. They're going to try for the death penalty, too. If that doesn't work out, then I will just have to do it myself.
>
> "I am pleading guilty for several reasons. One is I am guilty. I did what I'm charged with. I don't know what else I can say about it.
>
> "I have done some serious thinking in the matter. Over the past year I have been in jail on other charges, and I have undergone numerous psychiatric tests in competency hearings, and in all of these tests I'm found competent. I'm in full possession of my faculties, and I believe I know what I'm doing." (RT (Jan. 26, 1979) 3-7.)

The court suspended the proceedings and ordered a psychiatric-medical examination expressly directed to the question of whether respondent understood the nature and ramifications of a guilty plea in this case. (RT (Jan. 26, 1979) 7-9; CT 354.)

The medical report concluded:

> "It is the belief of the undersigned examiners that the patient is competent to stand trial as he knows the charges and he knows that he stands in peril if he is convicted on these charges. He could cooperate with his attorney if the attorney was able to be his advocate in the matter of his guilty plea.
>
> "This patient voluntarily makes his wishes known that he desires to plead guilty and he has a rational understanding of the consequences of his plea and is aware of what he is doing.
>
> "DIAGNOSIS: The patient is mentally competent to go to trial and he is mentally competent to enter a voluntary plea." (CT 32-36.)

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A hearing on respondent's competency was held February 6, 1979. At its conclusion the court found respondent mentally competent to enter a plea of guilty, and found further that he understood the seriousness of the plea. (CT 45-45A.)

Criminal proceedings were reinstated on February 14, 1979. (CT 356.) At that time respondent stated he still wished to plead guilty. Pursuant to California Penal Code section 1018, his counsel objected to the entry of the plea:

> "I have discussed this matter at great length with Mr. Chadd, and the record should reflect that. We have spent quite a bit of time talking about it. He is aware of his constitutional rights. He is aware of the impact of the decisions which have come down recently from our State Supreme Court.

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"I would indicate that he is certainly knowledgeable in what he is attempting to do. However, I want the record to reflect that it's without my consent." (RT (Vol. B) 2.)

Respondent then stated:

"THE DEFENDANT: . . . I would like to plead guilty to all these charges. If need be, I would request that the attorneys be dismissed from my case so that I might handle, go pro per and handle it myself, if that's the way I have to do it. I would like to retain [counsel] for advisory purposes, but I know under these other cases that I can plead guilty if I so desire, and that's what I want to do.

"As far as these capital cases, I don't know, I didn't understand everything that [the prosecutor] said, but I was under the understanding that I did have the right to enter a plea of guilty to those capital cases if I so desire, and that's what I would like to do. I don't want to take up any more of the Court's time trying to prove a case that they're going to prove anyway. I'm guilty. I did it, and I can't see any sense in going to court and dragging everybody up,

> having them come up for the court case and then having them come up for the penalty phase, too." (RT (Vol. B) 5.)

The Court told respondent that even if he pleaded guilty, he would be required to have a trial to decide the penalty to be imposed. Respondent stated he understood. (RT (Vol. B) 6.)

The court concluded respondent was astute and intelligent enough to understand his actions and to admit the offenses. (RT (Vol. B) 6-7.) However, respondent's counsel noted that for purposes of entering the plea, respondent was representing himself. (RT (Vol.B) 7.) The court therefore gave respondent a petition to proceed in propria persona and a plea form, both of which listed his constitutional rights. It had him examine the forms overnight and discuss them with counsel. (RT (Vol. B) 13-14.)

The following day, February 15, respondent returned to court. He stated he had examined both the petition to proceed in propria persona and change of plea form, and had discussed both documents with his counsel. He still desired to plead guilty to the charges. (RT (Vol. B) 16-17.)

The court told respondent of his rights to speedy and public trial, trial by jury, utilization of the processes of the court at no cost, confrontation and cross-examination, bail and representation. (RT (Vol. B) 17-19.) Respondent stated he understood these rights and had discussed them with his attorney. His attorney said respondent understood the rights when they discussed them. (RT (Vol. B) 19.) The court found respondent understood his rights and could make an intelligent waiver of them. (RT (Vol. B) 19.)

The court then inquired into respondent's education, which included political science, physics, writing and a little law. (RT (Vol. B) 20.)

Respondent also indicated he and his counsel had discussed, and he understood, the ramifications of the murder case, consequences of the change of plea, and the case itself, including possible theories of defense. Respondent had also discussed these matters with his counsel, and counsel in a related case. (RT (Vol. B) 21-22.)

With reference especially to the murder charges, respondent was again asked if he wished to plead guilty, even in light of his attorney's advice he not do so. He said he did. (RT (Vol. B) 23.)

The court informed respondent of the various motions which could be brought,

and the process used in the guilt phase, including: the People's request for the death penalty, trial probably by jury, motions regarding the composition of the jury, right to opening statement by he or his counsel, witnesses, cross-examination, right to subpoena witnesses and evidence, right to have evidence presented in his behalf or presented by respondent himself, control of admissibility of evidence, closing argument by he or his counsel, and instructions to the jury. Respondent said he understood these rights. (RT (Vol. B) 23-26.)

The prosecutor then informed respondent of the maximum penalties he could receive on each count by pleading guilty. After each count was explained, respondent was asked if he understood or had any questions. (RT (Vol. B) 26-36.)

The court found respondent literate, competent, and possessing the understanding to commence with a hearing for changing his plea. (RT (Vol. B) 36.)

Respondent took the stand and testified that he understood the murder charges, that the prosecution might ask for the death penalty, and the possible punishments for the charges in the information. He still wished to plead guilty and had no questions. (RT (Vol. B) 36-38.)

Respondent was arraigned. He pleaded guilty to each count, admitted all special allegations, and all special circumstances allegations. (RT (Vol. B) 39-50.) He stated the pleas were voluntary. (RT (Vol. B) 50.)

The court again advised respondent of his constitutional rights to jury trial, confrontation, cross-examination,

counsel and to remain silent. Respondent again waived these rights. (RT (Vol. B) 52-81; CT 357.)

For the remainder of the day on February 16, 1979, and the following day, respondent testified to, and admitted the factual basis for his pleas in counts 1 through 10. (RT (Vol. B) 52-91; CT 357-358.)

Prior to his admitting the special circumstance allegations, respondent was again advised of his constitutional rights with respect to guilty pleas. He again waived them. (RT (Vol. B) 97-100.)

Under California law, a jury trial was required in order to determine the punishment to be prescribed. (Cal. Pen. Code, § 190.4, subd. (b).) The penalty phase of this case began May 1, 1979, and was completed May 10, 1979. On May 11, the jury

returned a verdict fixing the penalty as death. (CT 371, 378-379.)

Respondent's appeal to the California Supreme Court was automatic. (Cal. Pen. Code, § 1239, subd. (b).)

2. THE CALIFORNIA SUPREME COURT'S RULING

On appeal, respondent relied upon California Penal Code section 1018. He urged the trial court should not have accepted his guilty plea because his counsel did not consent to it as is required by section 1018.

Petitioner urged section 1018 was unconstitutional insofar as it conditions the fundamental right to plead guilty on the consent of counsel, and because it violated Faretta v. California, supra, 422 U.S. 806; a decision which was rendered after section 1018 was drafted.

On January 19, 1981, by a four

to two decision, the California Supreme Court reversed the judgment of conviction and death penalty on count 6 (murder of Linda Hewitt). It also reversed counts 1, 7 and 10, finding they were factually necessary to the plea and verdict on count 6.[3/] (Appen. A.)

The California Supreme Court holds that under California Penal Code section 1018 a defendant in a capital case may not plead guilty unless his defense counsel consents to the plea. The court has further declared that Faretta v. California, supra, 422 U.S. 806, does not apply to pretrial proceedings but rather applies only to "adversary criminal trials." (See People v. Chadd, supra, 28 Cal.3d at pp. 750-751.)

Justices Richardson and Clark dissented from the majority opinion,

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3. Counts 2, 3, 4, and 5 were reversed because the statute of limitations had run.

concluding instead that the "right to defend," as guaranteed by this Court in Faretta necessarily includes the right to enter the plea of one's choice; therefore, Penal Code section 1018 violates the Sixth Amendment of the United States Constitution insofar as it premises a plea on counsel's consent. (People v. Chadd, supra, 28 Cal.3d at p. 759.)

Petitioner's request for a rehearing was denied by the California Supreme Court on March 2, 1981. (Appen. B.)

Petitioner's motion to stay issuance of the remittitur in this case pending action by the United States Supreme Court on this petition for writ of certiorari was also denied on March 2, 1981. (Appen. B.)

On March 25, 1981, Justice Rehnquist granted California's request for stay. A-792.

REASONS WHY CERTIORARI SHOULD BE GRANTED

ARGUMENT

I

WHERE A DEFENDANT IS ALLOWED TO ENTER A PLEA, HIS "RIGHT TO MAKE A DEFENSE" AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND FARETTA v. CALIFORNIA, NECESSARILY INCLUDES THE FUNDAMENTAL RIGHT TO ENTER THE PLEA OF HIS CHOICE. CALIFORNIA PENAL CODE SECTION 1018 IS UNCONSTITUTIONAL BECAUSE IT ELIMINATES THIS FUNDAMENTAL RIGHT

In Faretta v. California (1975) 422 U.S. 806, 834, this Court stated:

> "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual

> which is the lifeblood of the law.'" (Faretta v. California, supra, at p. 834.)

The court concluded that the right to defend is guaranteed by the Sixth Amendment of the United States Constitution.

The State of California, petitioner herein, contends that where a state permits a defendant to enter a plea, the decision as to what plea shall be entered is a fundamental, personal right which is necessarily included within his federally guaranteed right to defend. A state may not permit defense counsel to eliminate this federal right by allowing him to veto a defendant's decision to enter a plea of guilty.

California Penal Code section 1018 provides in pertinent part that while defendants in capital cases may enter pleas, no plea of guilty shall be received without the consent of defense counsel. In light of Faretta, section 1018 is clearly unconstitution

insofar as it conditions a plea of guilty on counsel's consent.

The California Supreme Court has rejected petitioner's argument. It concludes the constitutional right to defend and therefore Faretta, supra, apply only during adversary trials, not pretrial proceedings. (People v. Chadd (1981) 28 Cal.3d 739, 751.) Having thus limited the constitutional right to defend to adversary trials, the California Supreme Court concludes that defendants in capital cases have no right to enter the plea of their choice. It concludes California Penal Code section 1018 does not violate federally guaranteed rights.

Petitioner respectfully disagrees.

Neither the language nor rationale of Faretta suggest the right to make a defense applies only during adversary trials.

In limiting Faretta's reach solely to situations where an adversary trial has begun, the California Supreme Court relies upon language in Faretta:

> "The reach of Faretta is thus more modest. The court found self-representation to be an independent right implied by the structure and history of the Sixth Amendment. The opinion first categorizes the several pretrial and trial rights guaranteed by that amendment as 'necessary to a full defense' (id. at p. 818), and observes that the amendment 'constitutionalizes the right in an adversary criminal trial to make a defense as we know it.' (Ibid.; italics added.) The opinion then reiterates (at p. 819) that the amendment grants to the accused personally 'the right to make his defense,' and concludes: 'Although not stated in the Amendment in so many words, the right to self-representation —to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.' (Italics added; fn. omitted.) (Id. at pp. 819-820.)" (People v. Chadd, supra, 28 Cal.3d at p. 751.)

The reliance on Faretta's language is misplaced. While Faretta stands for the proposition that the "right to make a defense" requires the right to self-representation at a trial, nothing in Faretta limits the "right to make a defense" to self-representation at a trial. Nowhere does Faretta so strictly tie Sixth Amendment rights to a specific procedural stage of trial. Indeed, in discussing the Sixth Amendment, this Court noted:

> "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . ." (Faretta v. California, supra, 422 U.S. at p. 819.)

The right to "make a defense" is personal. It is a broader right than merely the ability to act as one's own counsel during a trial. As this Court further recognized:

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> "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to . . . ." (Faretta v. California, supra, 422 U.S. at p. 817, emphases added.)

Implicit in this statement is the defendant's right to refrain from defending himself. Obviously, when a defendant elects to plead guilty, he has elected not to defend himself.

Not only does Faretta's language fail to support an interpretation restricting the right to defend to adversary trials, its rationale is also inconsistent with such an interpretation.

The teaching of Faretta is that the personal and fundamental right to defend against criminal charges is not a child of procedure. It arises from the principles

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of human dignity, integrity and self-determination which underlie our federal Constitution and its history. (Faretta v. California, supra, 422 U.S. at pp. 833-834.)

By restricting Faretta's holding to adversary trials, the California Supreme Court concludes a defendant's right to self-determination with respect to the charges against him exists only if, and when, an adversary trial begins. This holding turns Faretta upside down. It makes that decision stand for the very proposition it expressly repudiates.

The California Supreme Court seeks support for its limitation of Faretta in Massie v. Sumner (9th Cir. 1980) 624 F.2d 72, cert. den. (Jan. 12, 1981) ___ U.S. ___, where it is concluded a defendant may not invoke Faretta in order to waive an automatic post-conviction review of his death sentence. However, reliance on Massie is misplaced.

The matter at issue in this case is far different than that at issue in automatic review cases. A defendant has no fundamental interest at stake in the automatic review procedure. He may not compel a state to provide such a review. He may not prevent it from providing such a review. On the other hand, a defendant does have a fundamental, constitutional interest in selecting the plea to be entered.

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In addition, the rationale of post conviction review cases is absent. The basis for Massie and People v. Stanworth (1969) 71 Cal.2d 820, 833 (on which the California Supreme Court also relies) is that in automatic postconviction review both the defendant and the California courts have parallel interests. Thus, it was held the defendant may not waive a right where to do so would involve the renunciation of a correlative duty imposed on the courts. (Massie v. Sumner, supra, 624 F.2d at p. 73.)

However, in California, there are no parallel interests between defendants and the courts with respect to what plea may be entered. While the State of California regulates the manner in which the plea is taken (Cal. Pen. Code, §§ 1003, 1016-1017), it has nowhere prohibited guilty pleas or given courts the authority to veto

an otherwise voluntary, intelligent plea of guilty.

What Penal Code section 1018 has done is place in defense counsel the authority to enter the plea of his choice. While the state's interest in every automatic review is the same, defense counsel's interests will not always be the same.

Faretta, therefore, does not support the California Supreme Court's conclusion that the right to make a defense means only that one may elect to act as one's own attorney during an adversary trial. Its rationale, which is an interpretation of the Sixth Amendment, encompasses any uniquely personal and fundamental decision which affects the ultimate course of a criminal proceeding. The decision as to what plea shall be entered is certainly within the category as was noted in Carter v. Illinois (1946) 329 U.S. 173, 174-175:

> "Neither the historic conception of Due Process nor the vitality it derives from the progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." (Emphasis added.)

This Court has repeatedly emphasized the personal and fundamental nature of the guilty plea.

In North Carolina v. Alford (1970) 400 U.S. 25, it was held that a defendant may plead guilty even while professing innocense.

Even before Alford, this Court held that a defendant's plea of guilty does not violate constitutional principles where it is motivated by a desire to relieve conscience, gain tactical advantage, or avoid the expense, personal agony or length of a

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trial. (Brady v. United States (1970) 397 U.S. 742, 750; also see United States v. Jackson (1968) 390 U.S. 570, 584.

In Boykin v. Alabama (1969) 395 U.S. 238, the personal and fundamental nature of guilty pleas compelled this Court to hold the trial record must reflect a defendant has personally waived those constitutional rights bound up in a plea of guilty.

Not only has this Court acknowledged the personal and fundamental nature of the plea, the American Bar Association, which sets standards for the proper administration of criminal justice, also views the choice of plea as one which is personal and fundamental to the defendant alone. In Standard 5.2 of the Standards Relating to the Defense Function, entitled "Control and Direction of the Case," it has concluded in pertinent part:

"'(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.' (Italics added.) . . ."

The commentary to Standard 5.2 explains:

"'The history of the criminal process in our system and the rights vested in an accused under the Constitution mark out certain basic decisions as belonging to the client; . . . The requirement that the defendant personally enter a guilty plea and that it be voluntary and informed carries the implication that it is the defendant who must make the choice. . . . Although counsel should not demand that his own view of the desirable course be followed, he is free to engage in fair persuasion and to urge his considered professional opinion on his client. Ultimately, however, because of the fundamental nature of these three decisions, crucial in such basis matters governing his own fate, the decisions on these matters belong to the accused.' (Pp. 238-239, italics added.)

The right to make a defense thus includes the right to enter the plea of one's choice.

* * * * *

II

PERMITTING DEFENSE COUNSEL TO VETO PLEAS OF GUILTY CREATES A SEVERE AND GRATUITOUS DISLOCATION OF THE PROCESSES OF JUSTICE

Even if the right to select the plea of one's choice is not included within "the right to make a defense," it is a fundamental, personal right which is protected by the Sixth Amendment of the United States Constitution. Indeed, it is inconceivable that there could be a more basic right than permitting the defendant, rather than someone else, to decide what his plea will be. The decision determines the course of the entire case, and is one on which the invocation of all other rights attending trial, are based. In Adams v. U.S. ex rel. McCann (1942) 317 U.S. 269, 276-277, Justice Frankfurter stated:

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> "It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the prompting of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. . . . And not even now is it suggested that a layman cannot plead guilty unless he had the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice." (Adams v. U.S. ex rel. McCann, supra, 317 U.S. at pp. 276-277.)

Petitioner respectfully submits that in allowing defense counsel to veto a plea of guilty, Penal Code section 1018, as upheld by the California Supreme Court, creates severe dislocation of the processes of justice; dislocation amply evidenced in this case.

A. Penal Code Section 1018 Strips the Trial Court of Its Ability and Obligation to Determine if a Plea is Intelligent and Voluntary

The California Supreme Court has concluded that requiring counsel's consent to a plea of guilty is a "reasonable proceeding" which serves:

> "[A]s a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant, as here, simply wants the state to help him commit suicide." (People v. Chadd, supra, 28 Cal.3d at p. 753.)4/

In upholding Penal Code section 1018, the California Supreme Court has done far more than establish counsel as a "filter." By granting defense counsel unilateral veto

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4. Petitioner strongly disagrees with the factual conclusion that respondent's plea was entered in order to commit suicide.

power over a plea of guilty, it has established counsel as the final arbiter on the question of whether the plea is intelligent and voluntary. It has stripped trial courts of their ability and obligation to establish whether a plea of guilty meets these constitutional requirements. This unorthodox and improper result has occurred in this case. Here, the trial court found respondent's plea to be intelligent and voluntary. Indeed, the California Supreme Court agrees inasmuch as it, too, has concluded respondent properly waived his constitutional rights prior to pleading guilty. (People v. Chadd, supra, 28 Cal.3d at p. 755.)

The decision as to whether the plea meets the heavy criteria of "voluntary" and "intelligent" must be left in the hands of those best qualified to render such a decision--the trial court and medical

(psychiatric) personnel. Defense counsel, although an interested person, has neither the medical expertise nor necessarily the same interests as those individuals in deciding the true basis of the plea.

Whether a defendant is pleading guilty out of some aberrant desire to die is a legitimate component in evaluating the voluntariness and intelligence of the plea. Whenever the issue arises, defense counsel quite properly should be encouraged and permitted to raise and explore the implications of a "death wish" as it relates to the intelligence and voluntariness of a given plea, present evidence on the question, and challenge the People's evidence. However, he should not be permitted to subvert the trial court's obligations by exercising a unilateral veto over both the plea and conclusions of the trial court.

If such a framework is not established and utilized, there is great danger in capital cases that the issue of "suicide" with all of its adverse implications will pervert the proceedings and obscure whatever meritorious issues there may be.

Permitting defense counsel to veto a plea of guilty is not only improper, it is an unwarranted "protection." In California a defendant in a capital case is first tried on the question of guilt or innocence, then separately tried on the question of punishment. While a defendant in California can plead guilty at the guilt phase, he may not waive the trial at which his punishment is decided. The punishment aspect of capital cases has thus been removed from the defendant's control. (Pen. Code, § 190.4.) Here,

respondent did not decide his punishment. A jury did.

This Court has repeatedly held that the sole standard for reviewing the correctness of a plea of guilty is whether the plea is voluntary and intelligent. (Brady v. United States, supra, 397 U.S. at p. 747; North Carolina v. Alford, supra, 400 U.S. at p. 31; United States v. Jackson, supra, 390 U.S. at p. 584; Boykin v. Alabama, supra, 395 U.S. 238.)

Where, as here, the trial court has found a guilty plea voluntary and intelligent after a full and fair consideration of the motives for the plea, and the state's capital punishment procedure is one which requires a separate hearing on the issue of punishment, counsel should not be permitted to veto the plea.

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B. Penal Code Section 1018 Strips the Defendant of His Right to Make a Uniquely Personal Decision

The decision to plead guilty is uniquely personal. It may arise from matters of conscience, morality, religion, and/or the desire to spare family and friends of cost and embarrassment of a public trial. (United States v. Jackson, supra, 390 U.S. at p. 584; Brady v. United States, supra, 397 U.S. at p. 750.) Placing the decision as to what plea shall be entered in the hands of defense counsel strips the defendant of his ability and right to make these determinations. The legal judgment of attorneys aside, to remove such a decision from the defendant as section 1018 does, and place it in the hands of, essentially, a stranger is intolerable.

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Indeed, removing the decision as to what plea shall be entered from the defendant carries with it the possibility of removing from him the ultimate personal decision: whether he will live or die. For example, defendants may enter into agreements that bring reduced sentences in exchange for a plea. (North Carolina v. Alford, supra, 400 U.S. 25.) Under the literal language of Penal Code section 1018, an attorney could veto a defendant's plea of guilty in exchange for reducing the punishment to life imprisonment. No matter how well intended, it shocks the conscience that an individual who must personally suffer the consequences of a plea cannot personally make the decision to accept a plea bargain.

The California Supreme Court, however, has decided that "defense counsel knows best" whether a defendant should be permitted to plead guilty. If the

teachings of past decisions are examined, this conclusion is unwarranted. There is no guarantee counsel in capital cases will be competent. (See People v. Frierson (1979) 25 Cal.3d 142.) There is no guarantee such counsel will act in his client's best interests. In one recent murder case, the conviction was overturned precisely because defense counsel's actions were governed not by the defendant's best interests, but the book he was writing. (People v. Corona (1978) 80 Cal.App.3d 684.)

The California Supreme Court also terms counsel's veto of a defendant's decision to plead guilty a "minor infringement" in capital cases. (People v. Chadd, supra, 28 Cal.3d at p. 751.) Petitioner vehemently disagrees. At no time is the decision to plead guilty more personal or fundamental than it is in capital cases.

In such cases, the desire to confess guilt and spare others the ordeal of a trial may well be the strongest.

Here, defense counsel has become master of respondent. Respondent wished to plead guilty because he was guilty. He clearly did not want to be subjected to a lengthy trial. (RT (Vol. B) 6.) Yet, pursuant to Penal Code section 1018, counsel is now permitted to veto such personal considerations.

C. Penal Code Section 1018 Creates an Impermissible Constitutional Tension

In addition to stripping the court of its powers and the defendant of his personal motivations for entering a plea of guilty, section 1018 created an unacceptable constitutional tension in this case.

Here, respondent wanted to plead guilty because after giving the matter

serious consideration, he wished to confess his guilt, and he did not want to prolong the trial process. (RT (Jan. 12, 1979) 5-7; RT (Jan. 26, 1979) 3-7; RT (Vol. B) 6.) He was clearly competent to reach this decision. On January 26, 1979, after indicating he wished to plead guilty, criminal proceedings were suspended pursuant to Penal Code section 1368, and an examination of respondent was ordered by the court. The examining doctors not only found him competent to stand trial and cooperate with his attorney, they also expressly found him mentally competent to enter a voluntary plea of guilty. (CT 32-36.) The superior court judge who held the hearing on the sanity matter on February 6, 1979, made these same findings. (CT 45-45A.) Indeed, respondent's own attorney was satisfied he was competent (CT 21-22), aware of his constitutional rights and Supreme Court

decisions, and was "certainly knowledgeable" in what he was attempting to do (RT (Vol. B) 2.)

Respondent and the trial court were placed in a ridiculous and untenable dilemma. Respondent was satisfied with the skill and representation of his counsel. He clearly wished to retain his counsel. However, he also wanted to enter the plea of his choice. Although he asked repeatedly for some way to exercise his constitutional rights to both, he was made to choose between them. Thus, he asked his counsel be discharged. This turmoil appears throughout the proceedings below. On January 12, 1979, he stated:

> "[I]t is my intention to plead guilty to the charges anyway and my attorney -- I respect his position saying that he would not allow me to plead so I would request that he be discharged at this time that I may represent myself and go ahead and enter a plea of

guilty." (RT (Jan. 12, 1979) 5-6, emphasis added.)

On January 26, 1979, respondent stated:

> "I believe I understand that I have the right to plead guilty, and still retain Mr. Pitkin as my attorney for advisory purposes." (RT (Jan. 26, 1979) 10.)

On February 14, 1979, respondent again stated:

> "I would like to plead guilty to all these charges. If need be, I would request that the attorneys be dismissed from my case so that I might handle, go proper and handle it myself, if that's the way I have to do it. I would like to retain Mr. Pitkin for advisory purposes, but I know under these other cases that I can plead guilty if I so desire, and that's what I want to do. . . ." (RT (Vol. B) 5, emphasis added.)

Below, respondent successfully backed the trial court into a constitutional dilemma of considerable seriousness. He was clearly satisfied with the accommodation

made. Yet, on appeal he urged, and the California Supreme Court agrees, that the trial court was wrong because it should have denied him his right to enter the plea of his choice.

The constitutional dilemma created by Penal Code section 1018 is untenable. The catch-22 into which it has thrown this case is inexcusable and appalling.

D. Penal Code Section 1018 Will Force Defendants to Represent Themselves at a Time When They Most Need Legal Assistance

The ultimate result of the California Supreme Court's decision will be to force a defendant to represent himself if his counsel will not agree to his plea. Indeed, respondent here demanded he be permitted to represent himself if his plea was not accepted. He certainly had

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this right under Faretta. (Faretta v. California, supra, 422 U.S. 806.) However, the wisdom of any statute which forces self-representation in a capital case should be seriously questioned.

E. Penal Code Section 1018 Creates an Illogical System of Justice Which Will Be Detrimental to Defendants

Section 1018 promotes an illogical system of justice. The California Supreme Court readily acknowledges that where a counsel vetoes a plea of guilty, the defendant may then take the stand at trial and confess his guilt or he may decline to present a defense. (People v. Chadd, supra, 28 Cal.3d at p. 750.) Yet, if the defendant has a right to take the stand and confess guilt at trial, he surely should have the right to do so at the time he is arraigned. If he does not, the trial process becomes little more than a charade

forced upon a defendant, such as respondent, who simply wishes to confess his guilt and spare himself and those around him the expense and time necessary for trial. As respondent noted below:

> "I am pleading guilty for several reasons. One is I am guilty. I did what I'm charged with. I don't know what else I can say about it." (RT (Jan. 26, 1979) 7.)
>
> "I don't want to take up any more of the Court's time trying to prove a case that they're going to prove anyway. I'm guilty. I did it, and I can't see any sense in going to court and dragging everybody up, having them come up for the court case and then having them come up for the penalty phase, too." (RT (Vol. B) 5.)

In a case like this, a forced trial becomes a hurdle to the truth; a useless and costly hurdle whose only result would be to let the guilty go free, create reversible error on appeal, or reach the same result which would have been reached had the defendant pleaded guilty.

Such a result makes a mockery even of the "right to defend" as perceived by the California Supreme Court. A defendant in a capital case in California faces bifurcated trials on guilt and punishment by the same jury. (Pen. Code, § 190.4.) It is not inconceivable he would want to plead guilty then use the plea to his tactical advantage at the punishment phase, e.g., by showing remorse. If a defendant is forced to represent himself at trial after counsel vetoes his decision to plead guilty, he has lost an important defense strategy. It would hardly assist such a defendant at the punishment phase if the jury had already been required to sit through an obviously needless, perhaps lengthy, trial as to guilt. Nor would it assist a defendant to have the jury listen to the same damaging evidence twice, and in more detail than if only a penalty trial were held.

F. Penal Code Section 1018 Promotes Discrimination and Arbitrariness

Finally, conditioning a guilty plea on counsel's consent injects into capital cases discrimination and arbitrariness; the very qualities which resulted in this Court declaring capital punishment practices unconstitutional in Furman v. Georgia (1972) 408 U.S. 238.

In California, once counsel has been appointed, a defendant cannot readily request a change of counsel. (People v. Marsden (1970) 2 Cal.3d 118, 123.) Where counsel has been appointed it is unlikely a defendant can obtain new counsel based upon his attorney's refusal to consent to his plea. Indigent defendants are thus placed at the mercy of the counsel appointed. However, a defendant who can afford to hire counsel of his choice can simply pick one who will allow him to enter the plea he

wishes. Such defendants can purchase the right to enter the plea of their choice.

In addition to the discrimination created by Penal Code section 1018, the statute creates arbitrary application of the law. Standard 5.2 of the American Bar Association Standards Relating to the Defense Function provides that the decision as to what plea shall be entered is a fundamental decision which rests solely with the defendant. If appointed counsel adheres to this standard, he will permit a defendant to plead guilty. If he does not, he may veto the defendant's choice. Thus, whether a defendant is permitted to plead guilty depends arbitrarily upon how defense counsel, as a matter of his own conscience and ethics, perceives his role vis-a-vis his client.

* * * * *

CONCLUSION

For the foregoing reasons, petitioner respectfully requests a petition for writ of certiorari issue to review the decision of the California Supreme Court.

Respectfully submitted,

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A P P E N D I X "A"

PEOPLE v. CHADD

Crim. 21024

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[Filed January 19, 1981]

C O P Y

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BILLY LEE CHADD, Defendant and Appellant.	Crim. 21024 Super.Ct. No. CR 45638

Defendant Billy Lee Chadd appeals from a judgment imposing a sentence of death following his plea of guilty to a charge of first degree murder. As will appear, we hold that the trial court committed prejudicial error in accepting that plea without the consent of defendant's counsel as required by Penal Code section 1018. Because of the limited nature of the issue, we need not

SEE CONCURRING AND DISSENTING OPINIONS

recite the facts of the case in detail.

Defendant was arraigned on a complaint charging him, inter alia, with the first degree murder of Linda Hewitt (count 6), and alleging special circumstances making the crime a capital offense under the statutes then in effect. (Former Pen. Code, § 190 et seq., added by Stats. 1977, ch. 316, §§ 5-14, pp. 1256-1262.) Defendant entered a plea of not guilty through his appointed counsel, David R. Pitkin; the court denied bail, but set the case for bail review one week later. On that day, however, Mr. Pitkin appeared without his client and informed the court that defendant was in a hospital after attempting to commit suicide. Because it appeared to the court that defendant might be mentally disordered, the court directed that he undergo a 72-hour period of

treatment and evaluation in a psychiatric facility. (Pen. Code, § 4011.6.)

Defendant thereafter waived the preliminary examination, and was arraigned on an information presenting essentially the same charges.[1/] The prosecutor announced

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1/ The basic charges are as follows:
Count 1: Murder of Patricia Franklin.
Count 2: Rape of Patricia Franklin.
Count 3: Sodomy of Patricia Franklin.
Count 4: Robbery of Patricia Franklin.
Count 5: Burglary of Patricia Franklin's house.
Count 6: Murder of Linda Hewitt.
Count 7: Rape of Linda Hewitt.
Count 8: Sodomy of Linda Hewitt
Count 9: Oral copulation of Linda Hewitt.
Count 19: Robbery of Linda Hewitt.
In addition, three special circumstances were alleged for the purpose of making the murder in count 6 a capital offense:
1. The murder was deliberate and premeditated, and was personally committed by defendant during the rape of Linda Hewitt (i.e., count 7).
2. The murder was deliberate and premeditated, and was personally committed

he would seek the death penalty on count 6. Mr. Pitkin informed the court that defendant wished to plead guilty against his advice, and that he would not consent to his client entering such a plea. As counsel observed, "This particular defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor." The following colloquy then took place:

"THE COURT: Mr. Chadd, your counsel has indicated that you want to commit this suicide. You want to plead guilty and have the Court help you in doing that. What about that?

"THE DEFENDANT: Your Honor,

1/ (Continued)

by defendant during the robbery of Linda Hewitt (i.e., count 10).

3. The murder was personally committed by defendant, and he had previously murdered Patricia Franklin (i.e., count 1).

it's true, I did attempt suicide. I have given serious consideration to the consequences of the trial, the outcome, what it might be. I feel the death penalty would be, for all intents better for me.

"If the State of California can't, and I don't receive the death penalty, then I have got another shot in Nevada. They're going to try for the death penalty, too. [2/] If that doesn't work out, then I will just have to do it myself."

In view of this attitude, the court declared a doubt as to defendant's sanity, suspended the criminal proceedings, and ordered defendant to undergo a further psychiatric examination. (Pen. Code, § 1368.)

The proceedings resumed after defendant was found mentally competent.

2/ It appears that defendant had also been charged with murder in Nevada.

Mr. Pitkin began by reiterating his firm objection to any plea of guilty by his client. He explained that according to his reading of Penal Code section 1018, "a guilty plea to a capital offense requires consent of counsel." And although he acknowledged that defendant was attempting to enter such a plea, he stated that "I want the record to reflect that it's without my consent."

The prosecutor apparently agreed with defense counsel's understanding of the law, and recommended on behalf of the People that the court "not accept a guilty plea from the defendant under these circumstances" but rather set the case for trial.

The court declined to follow this recommendation. It ruled, rather, that if it could find defendant sufficiently competent to act as his own attorney under the standards of Faretta v. California (1975) 422 U.S. 806, it would accept his guilty

plea despite the refusal of his counsel of record to consent thereto. The court reasoned simply that such a finding would be "tantamount to" relieving Mr. Pitkin as counsel and permitting defendant to actually represent himself. The court thereupon questioned defendant, found him competent within the meaning of Faretta, and allowed him to plead guilty to all counts of the information and to admit all the charged enhancements and the special circumstances allegations. At no time, however, was Mr. Pitkin in fact relieved of his duties, and throughout the proceedings he continued to act as defendant's counsel of record.[3/]

3/ For example, even after finding defendant competent to represent himself under Faretta, the court began the hearing on the change of plea by asking defendant for the record, "Your counsel is Mr. Pitkin?" Defendant replied in the affirmative. During the remainder of the hearing the

A jury was subsequently empanelled for the penalty phase of the trial, and fixed the punishment at death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant first contends that the trial court had no authority to accept his guilty plea to a capital offense in the face of his counsel's express refusal to consent to the entry of such a plea. The point is well taken. Penal Code section 1018 provides in relevant part that no guilty plea to a felony punishable by death or life imprisonment without possibility of parole "shall be received from a

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3/ (Continued)

court several times referred to Mr. Pitkin as "your counsel." And when in conclusion the court reiterated its finding that defendant was competent to represent himself, the following exchange occurred:

"MR. PITKIN: Is the Court making -- there has been no request that he represent himself.

"THE COURT: I know he hasn't, but I make that finding."

defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel." The record amply demonstrates that Mr. Pitkin did not give that consent. Under the terms of section 1018, therefore, the court erred in allowing defendant to plead guilty to count 6 of the information.

In an effort to avoid this result, the Attorney General urges first that section 1018 can be "construed" to permit a capital defendant to discharge his attorney, represent himself, and enter a guilty plea. There are three answers to this contention. First, in the case at bar it is entirely hypothetical: although he well knew of his right to do so, defendant never made an unequivocal request to discharge Mr. Pitkin and represent himself, and hence was never granted that status; on the contrary, with defendant's agreement

Mr. Pitkin continued to act as his counsel throughout the proceedings. (See fn. 3, ante.) We will not, of course, adjudicate hypothetical claims or render purely advisory opinions. (Younger v. Superior Court (1978) 21 Cal.3d 102, 119-120, and cases cited.)

Second, it is difficult to conceive of a plainer statement of law than the rule of section 1018 that no guilty plea to a capital offense shall be received "without the consent of the defendant's counsel." It is settled that "when statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it." (Solberg v. Superior Court (1977) 19 Cal.3d 182, 198.)

Third, even if section 1018 were subject to construction, the Attorney General's proposal would make a major portion of the statute redundant. He urges in effect that it be read to permit a capital

defendant to discharge his attorney and plead guilty if he knowingly, voluntarily, and openly waives his right to counsel. But that is precisely what the third sentence of section 1018 expressly authorizes non-capital defendants to do.[4/] The proposal would thus obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former. Such a construction would be manifestly improper. (J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, 36-37,

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4/ The third sentence of section 1018 provides: "No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel." (Italics added.)

and cases cited.)

In the alternative, the Attorney General contends that if section 1018 cannot be so construed it is unconstitutional because it allows counsel to "veto" a capital defendant's decision to plead guilty. The argument, however, is both diffuse and obscure. The Attorney General appears to concede that in capital cases a state could constitutionally prohibit guilty pleas altogether and insist that the prosecution prove each such charge to the satisfaction of the trier of fact. But the state's power to prohibit guilty pleas, asserts the Attorney General, does not include the lesser power to condition such pleas on the consent of defense counsel. To do so, he claims, disturbs the "uniquely personal" nature of the defendant's decision to plead guilty, denies him his "fundamental right" to control the ultimate course of the

prosecution, and destroys the constitutionally established relationship of counsel as the defendant's "assistant" rather than his master.

The contention fails to recognize the larger public interest at stake in pleas of guilty to capital offenses. It is true that in our system of justice the decision as to how to plead to a criminal charge is personal to the defendant: because the life, liberty or property at stake is his, so also is the choice of plea. (In re Williams (1969) 1 Cal.3d 168, 177, fn. 8.) But it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016),[5/] when he may

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5/ In the original Penal Code of 1872 only three pleas were cognizable: guilty, not guilty, and former conviction or acquittal.

do so (id., § 1003), where and how he must plead (id., § 1017), and what the effects are of making or not making certain pleas. 6/

A plea of guilty, of course, is the most serious step a defendant can take in a criminal prosecution. It operates first as a waiver of formal defects in the accusatory pleading that could be reached by demurrer. (People v. Beesly (1931) 119 Cal.App. 82, 87; In re Cook (1910) 13

5/ (Continued)

In 1880 the Legislature added the plea of once in jeopardy. In 1927 the plea of not guilty by reason of insanity was incorporated into the statute. In 1963 the statute was again amended to provide for the plea of nolo contendere. And since 1955 the Legislature has permitted conditional pleas specifying the degree of the offense or the punishment to be imposed. (§ 1192.1 et seq.)

6/ Thus section 1016 declares that a defendant who pleads not guilty by reason of insanity without also pleading not guilty is presumed to admit the commission of the offense, and a defendant who does not plead not guilty by reason of insanity is presumed to have been sane at the time the offense was committed.

Cal.App. 399, 403.) Next, because there will be no trial the plea strips the defendant of such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation. (Boykin v. Alabama (1969) 395 U.S. 238, 243; In re Tahl (1969) 1 Cal.3d 122, 130-133.) As to the merits, the plea is deemed to constitute a judicial admission of every element of the offense charged. (People v. DeVaughn (1977) 18 Cal.3d 889, 895.) Indeed, it serves as a stipulation that the People need introduce no proof whatever to support the accusation: the plea ipso facto supplies both evidence and verdict. (People v. Jones (1959) 52 Cal.2d 636, 651.) "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."

(Boykin v. Alabama, supra, at p. 242 of 395 U.S.) Finally, it severely restricts the defendant's right to appeal from the ensuing judgment. (People v. DeVaughn, supra, at pp. 895-896 of 18 Cal.3d.)

In view of these consequences, the Legislature has demonstrated an increasing concern to insure that no defendant enter a guilty plea in our courts without fully understanding the nature and consequences of his act. To begin with, since its inception the law of California has required that each plea be entered by the defendant both personally and in open court. (Stats. 1851, ch. 29, § 301, p. 245; Pen. Code, § 1018.)

Over 30 years ago the Legislature deemed it necessary to impose special precautions against ill-advised guilty pleas, drawing a distinction according to the severity of the potential punishment. Thus

it amended section 1018 to provide that (1) no guilty plea to a felony punishable by death or life imprisonment without possibility of parole shall be received from any defendant "who does not appear with counsel," and (2) no guilty plea to any other felony shall be accepted from such a defendant unless he has voluntarily, intelligently, and openly waived his right to counsel (see fn. 4, ante). (Stats. 1949, ch. 1310, § 1, p. 2298; Stats. 1951, ch. 858, § 1, p. 2369.)

Apparently impelled by two developments in the case law, the Legislature returned to the problem in 1973. In April of that year we decided People v. Vaughn, 9 Cal.3d 321. We there recognized that "In requiring a defendant who wishes to plead guilty to a capital offense to be represented by counsel, section 1018 is obviously designed to

protect defendants by assuring that such a serious step is a fully informed and competent one, taken only after consideration with and advice by counsel." (Id. at p. 327.) On the facts of the case, nevertheless, we held that section 1018 as it then read did not bar the defendant from pleading guilty to a capital charge even though his counsel had expressly advised him against making such a plea. We reasoned in effect that although the statute insured that a capital defendant have the advice of an attorney (i.e., "appear with counsel") before pleading guilty, it did not also require him to follow that advice.

Several months later, however, the Legislature closed the statutory gap revealed in Vaughn by adding to section 1018 the further requirement that a court cannot accept a guilty plea to a capital

charge "without the consent of the defendant's counsel." (Stats. 1973, ch. 719, § 11, p. 1301.) The effect of the amendment on the Vaughn rule is plain: we may safely assume it uncommon that an attorney who has advised a capital defendant against pleading guilty will consent to allow him to act contrary to that advice and to counsel's professional judgment as to his client's best interests. It follows that since the 1973 amendment a capital defendant is no longer permitted to plead guilty in this state against the advice of his attorney. 7/

7/ A dictum to the contrary in People v. Teron (1979) 23 Cal.3d 103, 115, citing Vaughn for the proposition that a capital defendant "has the right to plead guilty, even against the advice of counsel," did not take into account this legislative development after Vaughn and is therefore disapproved.

The related holding of Teron -- i.e., that a capital defendant representing himself under Faretta has no duty to "present a defense" but may simply "put the state to its proof" -- remains valid. Such a

Nor was this amendment adopted as an isolated statute in the 1973 session. Rather, it was an integral part of the Legislature's extensive revision of the death penalty laws in response to the decision of the United States Supreme Court in Furman v. Georgia (1972) 408 U.S. 238. (Stats. 1973, ch. 719, §§ 2-6, pp. 1297-1300.) That revision, of course, was an effort to eliminate the arbitrariness that Furman found inherent in the operation of prior death penalty legislation. (See Rockwell v. Superior Court (1976) 18 Cal.3d 420.) The fact that the requirement of counsel's consent to guilty pleas in capital cases was enacted

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7/ (Continued)

defendant can presumably also take the stand and confess guilt. But neither of these possibilities resolves the issue at hand. First, as explained above, a guilty plea has more immediate and drastic consequences than even a judicial confession; second, and most importantly, the Legislature has spoken on the subject of guilty pleas.

as part of that statutory scheme demonstrates that the Legislature intended it to serve as a further independent safeguard against erroneous imposition of a death sentence.

Two years later the United States Supreme Court decided Faretta, holding that defendants in state criminal trials have a federal constitutional right of self-representation. But that decision did not strip our Legislature of the authority to condition guilty pleas in capital cases on the consent of defense counsel. Just as the source of the right of self-representation is not simply the fact that the defendant can waive counsel (422 U.S. at pp. 819-820, fn. 15), so also the scope of the right of self-representation is not the mirror-image of the right to counsel. Faretta does not purport to guarantee a defendant acting in propria persona the right to do any and all things

his attorney could have done: on the contrary, the high court recognized that "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." (Id. at p. 835.)

The reach of Faretta is thus more modest. The court found self-representation to be an independent right implied by the structure and history of the Sixth Amendment. The opinion first categorizes the several pretrial and trial rights guaranteed by that amendment as "necessary to a full defense" (id. at p. 818), and observes that the amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." (Ibid.; italics added.) The opinion then reiterates (at p. 819) that the amendment grants to the accused

personally "the right to make his defense," and concludes: "Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." (Italics added; fn. omitted.) (Id. at pp. 819-820.)

The Attorney General in effect stands Faretta on its head: from the defendant's conceded right to "make a defense" in "an adversary criminal trial," the Attorney General attempts to infer a defendant's right to make no such defense and to have no such trial, even when his life is at stake. But in capital cases, as noted above, the state has a strong interest in reducing the risk of mistaken

judgments. Nothing in Faretta, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent. It is significant that the Attorney General is unable to cite any authority, either federal or state, that holds to the contrary.[8/]

The public interest at issue

8/ Even in noncapital cases the state has properly circumscribed the right to plead guilty in order to protect defendants against the consequences of their own folly or neglect. Thus even an undoubtedly intelligent and voluntary guilty plea made by a defendant represented by counsel cannot be accepted until the court has satisfied itself by an evidentiary hearing that "there is a factual basis for such plea." (Pen. Code, § 1192.5, 3d par.)

here has been promoted in related contexts. Before Faretta, the high court recognized that a state in its wisdom could constitutionally prohibit all guilty pleas to murder charges and insist that the prosecution prove each such case. (North Carolina v. Alford (1970) 400 U.S. 25, 38-39.) There is not the slightest indication in Faretta that it is intended to abrogate that rule. Secondly, before Faretta this court squarely held that a capital defendant has no right to waive his automatic appeal: "It is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive

the right provided for him. In other contexts it has been held that a defendant's waiver or attempted waiver of a right is ineffective where it would involve also the renunciation of a correlative duty imposed upon the court." (People v. Stanworth (1969) 71 Cal.2d 820, 833; accord, People v. Teron (1979) supra, 23 Cal.3d 103, 115, fn. 7.)

Again, nothing in Faretta abrogates that rule. Indeed, only one year after Faretta the high court described automatic review of a judgment of death by the state supreme court as "an important additional safeguard against arbitrariness and caprice" (Gregg v. Georgia (1976) 428 U.S. 153, 198; accord, People v. Frierson (1979) 25 Cal.3d 142, 181). In these circumstances Faretta does not grant a capital defendant the right to "defend" himself by discharging his counsel and

waiving his automatic appeal. As we explained in Stanworth (at p. 834 of 71 Cal.2d), "It is not entirely 'his appeal,' since the state, too, has an indisputable interest in it which the appellant cannot extinguish."

The Ninth Circuit Court of Appeals has recently so held. In Massie v. Sumner (1980) 624 F.2d 72, cert. den. (Jan. 12, 1981) ___ U.S. ___, a defendant under a California sentence of death who had attempted unsuccessfully to waive his automatic appeal in this court sought federal habeas corpus on the ground, inter alia, that such a compulsory proceeding violates his right of self-representation under Faretta. Affirming a denial of relief, the circuit court reasoned: "While Massie is correct in that he enjoys a constitutional right to self-representation, this right is limited and

a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings. [Citation.]" (Italics added; id. at p. 74.) The court stressed that "a state may require reasonable proceedings in order to protect its own interests in the fairness of its determinations. In the same sense that a state may constitutionally require competency evaluations, a factual basis for a guilty plea, and other routinely accepted proceedings, it may also require a higher court review of a death sentence and conviction." (Ibid.) The reason for this rule, said the court, is that "The state of California has a strong interest in the accuracy and fairness of all its criminal proceedings; this interest is most pronounced in a case such as this where a defendant pleaded guilty and was

sentenced to death without the assistance of counsel." (Ibid.)

The state's interest is no less pronounced when, as in the case at bar, a defendant is permitted to plead guilty to a capital offense over the vehement objections of his attorney. And the requirement of counsel's consent to such a plea is surely one of the "reasonable proceedings" held permissible by the Massie court for the purpose of protecting that interest. As defense counsel suggests, it serves inter alia as a filter to separate capital cases in which the defendant might reasonably gain some benefit by a guilty plea from capital cases in which the defendant, as here, simply wants the state to help him commit suicide.[9/]

9/ Similarly, in Commonwealth v. McKenna (Pa. 1978) 383 A.2d 174, a defendant refused to challenge the constitutionality of the law under which he was

Finally, the question now before us is not new to this court, but was answered in effect by our decision in People v. Ballentine (1952) 39 Cal.2d 193. There a defendant charged with a capital murder appeared with counsel at his arraignment, and obtained a continuance. At the next

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9/ (Continued)

sentenced to death, or to permit his counsel to do so. The Pennsylvania Supreme Court nevertheless held the law invalid under Furman, reasoning (at p. 181) that "while a defendant may normally make an informed and voluntary waiver of rights personal to himself, his freedom to do so must give way where a substantial public policy is involved; . . . It is evident from the record that Gerard McKenna personally prefers death to spending the remainder of his life in prison. While this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide. The waiver rule cannot be exalted to a position so lofty as to require this court to blind itself to the real issue -- the propriety of allowing the state to conduct an illegal execution of a citizen." (Italics added; fn. omitted.)

hearing the defendant knowingly and voluntarily discharged his attorney and then entered a guilty plea. On his automatic appeal from an ensuing judgment of death, the defendant contended that section 1018 deprived the trial court of authority to receive his guilty plea to a capital crime while he was unrepresented by counsel. The Attorney General relied, as he does here, on the defendant's right of self-representation. Although Faretta had of course not been decided, a right of self-representation then deemed to be as broad as that recognized in Faretta was guaranteed in our courts by the former provisions of article I, section 13, of the California Constitution. The Attorney General argued that section 1018 should not be permitted to impair that constitutional right.

We rejected the Attorney

General's argument, reasoning that section 1018 does not prevent a defendant from waiving counsel and defending himself; "It merely prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel." (39 Cal.2d at pp. 195-196.) We explained that although a defendant has a constitutional right to defend himself in person, "he is not guaranteed the right to plead guilty to a charge of a felony punishable with death. . . . The Legislature has deprived the court of the power to accept a guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel." (Id. at p. 196.) Declaring that section 1018 was "designed to protect adequately the rights of a defendant charged with a capital offense," we

stressed that other states (e.g., New York, New Jersey) had enacted statutes that totally prohibited a capital defendant from pleading guilty under any circumstances. (Ibid.) We concluded that "Not having an absolute right to enter a plea of guilty, the defendant is not deprived of any right by being permitted to enter the plea only if he is represented by counsel." (Id. at pp. 196-197.)

We therefore reversed the judgment of death with directions to the trial court to "strike from its records Ballentine's plea of guilty to the charge of murder." (Id. at p. 197.) The decision was unanimous, and its holding has never been questioned. Nor can it fairly be distinguished on its facts: although the case was decided before the 1973 amendment to section 1018 adding the requirement that counsel consent to a guilty plea by

a capital defendant, that requirement is couched in exactly the same mandatory language as the original requirement that such a defendant "appear with counsel." Indeed, because the consent requirement is even plainer than the latter, the holding of Ballentine applies a fortiori in the case at bar: here, too, "Not having an absolute right to enter a plea of guilty, the defendant is not deprived of any right by being permitted to enter the plea only if [his counsel consents]."

We conclude that the trial court erred in accepting defendant's guilty plea to the charged capital offense without such consent. The error requires that the judgment be reversed insofar as it convicts defendant of first degree murder on count 6 and finds true the special circumstances

alleged in support of that count, and insofar as it imposes the penalty of death on the same count. Accordingly, we need not reach defendant's additional contentions relating to the voluntariness of his plea on count 6, the procedure leading to the special circumstances findings, and the penalty phase.

There remains one contention that defendant directs to all ten counts of the information, to wit, that his guilty plea to each count was invalid because the trial court assertedly did not advise him of his privilege against self-incrimination and obtain a waiver thereof before accepting such plea, as required by Boykin v. Alabama (1969) supra, 395 U.S. 238, 243, and In re Tahl (1969) supra, 1 Cal.3d 122, 131-133. The claim is refuted by the record. We need not further lengthen this opinion by quoting

verbatim the numerous and detailed recitals by the court and counsel of the constitutional rights that defendant would give up by pleading guilty, and defendant's express waivers of those rights. We have examined the relevant proceedings with care, and conclude that defendant was in fact advised of his privilege against self-incrimination and waived that privilege before his guilty plea to each count was accepted.

It does not follow, however, that the judgment should be affirmed as to all counts other than count 6. In Ballentine the defendant pleaded guilty not only to murder but also to one count of robbery, and the murder was found to be of the first degree because it was committed in perpetration of that robbery. After this court held the murder conviction invalid under section 1018, we addressed the robbery conviction. We reasoned that if that

conviction were affirmed, it would be conclusive on retrial of the murder count and the prosecution would need only prove the fact of the killing in its perpetration in order to obtain a new conviction of first degree murder. In such circumstances, we concluded the conviction should also be reversed as to the robbery count. (39 Cal.2d at p. 197.)

The case at bar presents similar facts. As noted above (fn. 1, ante), proof of the special circumstances alleged in count 6 turns principally on proof that defendant committed each of the felonies charged against him in counts 1, 7, and 10. If his conviction on those counts is affirmed, it would be conclusive on retrial of count 6 and would eliminate most of the prosecution's burden to prove special circumstances imposed by the Legislature. As in Ballentine, therefore,

the judgment should also be reversed as to counts 1, 7, and 10.

Finally, defendant contends that the statute of limitations compels reversal of his conviction on counts 2, 3, 4, and 5 (see fn. 1, ante). The record demonstrates on its face that the contention is meritorious. The information alleges that each of the felonies charged in counts 2, 3, 4, and 5 was committed on or about July 26, 1974; but the information itself was not filed until January 25, 1979, i.e., four and one-half years later. Penal Code section 800 requires that an information charging such felonies be filed within three years after their commission.

The Attorney General responds that defendant should be deemed to have waived this defect because he failed to raise it either by demurrer or by motion in arrest of judgment. The argument is

premised on Penal Code section 1012, which provides in effect that when a ground of demurrer "mentioned in Section 1004" appears on the face of the accusatory pleading it will be deemed waived unless the defendant raises it by demurrer or, if the ground is failure to state a public offense, by demurrer or motion in arrest of judgment. Section 1012 is not controlling in this context. It is true the courts have described as "failing to state a public offense" an accusatory pleading that shows on its face a violation of section 800. Nevertheless, the bar of the statute of limitations is not in fact "mentioned in Section 1004."[10/] Thus while sections 1004 and 1012, insofar as relevant here, have remained essentially unchanged since 1872, the courts have not

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10/ The grounds of demurrer listed in that statute are lack of jurisdiction in the grand jury or the court, defects of form, more than one offense charged, failure to state a public offense, and legal justification or excuse.

consulted them in resolving the question now before us.

That question, indeed, was not settled until 1934, when this court decided People v. McGee, 1 Cal.2d 611. The court there observed (at p. 613) that "Whether the statute of limitations in criminal cases is jurisdictional, or a matter of defense to be affirmatively pleaded by the defendant, is a question upon which there exists some diversity of opinion. . . . [¶] It is necessary that this confusion be eliminated, and that the rule which shall govern prosecutions in this state be declared." The court then squarely held that "the more desirable rule is that the statute is jurisdictional," and drew the conclusion that "The point may therefore be raised at any time, before or after judgment." (Italics added; ibid.) The court recognized that a different rule

governed civil actions, and explained: "In civil actions the statute is a privilege which may be waived by the party. In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter." (Italics added; ibid.) The corollary was equally clear: "It follows that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone." (Id. at pp. 613-614.)

The decision was unanimous, and has been followed by this court without question for almost half a century. (See, e.g., People v. Crosby (1962) 58 Cal.2d 713,

722; People v. Rehman (1964) 62 Cal.2d 135, 139; In re Demillo (1975) 14 Cal.3d 598, 601-602.) In a recent discussion of the matter we reiterated that in criminal cases "in California the statute of limitations constitutes a substantive rather than a procedural right which is not waived by failure to assert it at the pleading stage. . . . [I]t is now well settled that a conviction, even if based on a plea of guilty, is subject to collateral [or direct] attack if the charge was originally barred by the applicable limitation period," citing Demillo and McGee. (People v. Zamora (1976) 18 Cal.3d 538, 547.) The rule is a reflection of the fundamental principle of our law that "the power of the courts to proceed" -- i.e., their jurisdiction over the subject matter -- cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel

(Summers v. Superior Court (1959) 53 Cal.2d 295, 298; Sampsell v. Superior Court (1948) 32 Cal.2d 763, 773, and cases cited), and hence that the lack of such jurisdiction may be raised for the first time on appeal. (Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal.2d 713, 721; Petty v. Manpower, Inc. (1979) 94 Cal.App.3d 794, 798-799.)

It is undisputed that in the information filed herein "nothing is alleged to take the case out of the statute." Under the rule of McGee and its progeny, accordingly, the judgment must be reversed as to counts 2, 3, 4, and 5.

There is no merit, however, in defendant's further contention that on remand these counts cannot be amended to allege facts tolling the statute (see Pen. Code, § 802). Our reversal of the judgment on these counts, of course, "remands the

cause for new trial and places the parties in the trial court in the same position as if the cause had never been tried." (People v. Murphy (1963) 59 Cal.2d 818, 833.) After entry of plea, an accusatory pleading may be amended with leave of court "for any defect or insufficiency, at any stage of the proceedings" -- including, therefore, on remand after reversal -- provided the amendment does not "change the offense charged" or otherwise prejudice the substantial rights of the defendant. (Pen. Code, § 1009.) An amendment adding allegations tolling the statute of limitations does not "change the offense charged" (People v. Crosby (1962) supra, 58 Cal.2d 713, 723); and there is neither claim nor showing that such an amendment would prejudice the substantial rights of this defendant, who has been aware of these charges at all times and

indeed testified at length to the factual basis of each in pleading guilty thereto. It follows that on remand the prosecution will be entitled to seek leave to amend the information by adding appropriate allegations tolling the statute. (People v. Rose (1972) 28 Cal.App.3d 415, 418; accord, People v. Morgan (1977) 75 Cal.App.3d 32, 38.)

CONCLUSION

On counts 1, 6, 7, and 10 the judgment is reversed with directions to the trial court to strike from its records defendant's pleas of guilty and his admissions of charged enhancements and special circumstances allegations.

On counts 2, 3, 4, and 5 the judgment is reversed.

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In all other respects the judgment is affirmed.

MOSK, J.

WE CONCUR:

TOBRINER, J.
NEWMAN, J.

I CONCUR IN THE JUDGMENT:

BIRD, C.J.

C O P Y

PEOPLE v. CHADD

Crim. 21024

CONCURRING OPINION BY BIRD, C.J.

I join Justice Mosk's opinion only insofar as it resolves the issues of (1) the propriety of accepting appellant's guilty pleas to counts 1, 6, 7 and 10, and (2) the adequacy of appellant's waiver of the privilege against self-incrimination. I also concur in the judgment of the court.

BIRD, C.J.

C O P Y

PEOPLE v. CHADD

Crim. 21024

CONCURRING AND DISSENTING OPINION
BY RICHARDSON, J.

I concur in the judgment to the extent that it reverses defendant's conviction of counts 2, 3, 4 and 5, because these counts were barred by the statute of limitations.

I respectfully dissent, however, from the reversal of counts 1, 6, 7 and 10. My disagreement with the majority, while simple, is very fundamental. In my view, the right to enter a particular plea in a criminal proceeding is that of the defendant alone. It cannot be subjected to to the veto of defense counsel. It follows that section 1018 of the Penal Code is unconstitutional, because it unduly restricts

the right of self-representation guaranteed by the Sixth Amendment of the United States Constitution. (See Faretta v. California (1975) 422 U.S. 806.) Accordingly, the majority errs in reversing the judgment as to counts 1, 6, 7 and 10 on the ground that defendant's counsel refused to consent to defendant's plea of guilty as required by section 1018.

In Faretta, the United States Supreme Court held that the California courts improperly deprived the defendant of his constitutional right to conduct his own defense when they forced him, against his will, to accept a state-appointed public defender. As the high court stated, "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his

particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [Citation.]" (422 U.S. at p. 834, fn. omitted.)

"The right to defend is personal." These words hold the key to the issue before us. The majority attempts to distinguish Faretta on the basis that its rule and reasoning extends only to defendants who choose to represent themselves in the oourse of an adversary criminal trial, rather than to plead guilty before trial. (Ante, p. ___ [maj. opn., at p. 13].) Such a distinction is much too narrow. The "right to defend" necessarily encompasses the initial, and uniquely personal, decision whether to mount a defense at the guilt phase. Faretta quoted with evident approval

the following excerpt from Carter v. Illinois (1946) 329 U.S. 173, 174-175, where a similar point was made: "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." (Italics added.) Indeed, the majority herein acknowledges that the self-represented defendant "under Faretta has no duty to 'present a defense' but may simply 'put the state to its proof' . . . . Such a defendant can presumably also take the stand and confess guilt." (Ante, p. ___ [maj. opn., at p. 11, fn. 7, italics added].)

If the right to "take the stand

and confess guilt" is constitutionally protected by Faretta from state interference, then surely the comparable right to appear at the arraignment and plead guilty is likewise so protected, for in both cases the defendant makes the personal, fundamental decision, which is his alone to make, to acknowledge his guilt of a criminal offense. Whatever the reason which impelled that critical choice, the Constitution assures that it belongs to the defendant, and to no one else. Prior California authorities have consistently supported this proposition. (See People v. Vaughn (1973) 9 Cal.3d 321, 328; In re Williams (1969) 1 Cal.3d 168, 177, fn. 8; In re Beaty (1966) 64 Cal.2d 760, 765; In re Rose (1965) 62 Cal.2d 384, 390.) Our most recent expression was in People v. Teron (1979) 23 Cal.3d 103, 115, wherein, speaking through Justice Tobriner, we said,

"Defendant, however, bears no duty to present a defense. He has the right to plead guilty, even against the advice of counsel." (Italics added.)

This fundamental principle is not only consistent with prior California law, it is supported by sound and careful reasoning with nationwide acceptance. Thus, the American Bar Association, which has adopted certain standards for the administration of criminal justice, includes one which is fully applicable here. Standard 5.2 of the Standards Relating to the Defense Function, entitled "Control and Direction of the Case," provides in pertinent part that "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii)

whether to waive jury trial; (iii) whether to testify in his own behalf." (Italics added.) The commentary to standard 5.2 explains that "The history of the criminal process in our system and the rights vested in an accused under the Constitution mark out certain basic decisions as belonging to the client; . . . The requirement that the defendant personally enter a guilty plea and that it be voluntary and informed carries the implication that it is the defendant who must make the choice . . . . Although counsel should not demand that his own view of the desirable course be followed, he is free to engage in fair persuasion and to urge his considered professional opinion on his client. Ultimately, however, because of the fundamental nature of these three decisions, crucial in such basic matters governing his own fate, the decisions on

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these matters belong to the accused."
(Pp. 238-239, italics added.)

It should be noted that the foregoing standard and its accompanying commentary recognize both the personal, fundamental nature of the decision to plead guilty and its close equivalence to the decision to testify at trial. Contrary to the majority's analysis, both rights are constitutionally protected by self-representation principles.

The uniquely personal nature of the decision whether or not to plead guilty is readily demonstrated by reviewing some of the legitimate and compelling reasons which might motivate such a plea. The defendant might enter a guilty plea to (1) relieve his conscience through confession and atonement, (2) gain some tactical advantage, including a less severe penalty, (3) avoid the "agony and expense" of an

unnecessary and prolonged trial, where the evidence of guilt is overwhelming (see Brady v. United States (1970) 397 U.S. 742, 750), or (4) spare friends and relatives the spectacle and embarrassment, and perhaps publicity, of a public trial (see United States v. Jackson (1968) 390 U.S. 570, 584). If he chooses to do so, intelligently and voluntarily, the defendant should have the right to accomplish these ends by pleading guilty. Under the majority's holding, however, state-appointed counsel can defeat these purposes with impunity by simply declining to consent to the plea. To me it makes no sense to say that a criminal defendant has a constitutional right to take the stand during his trial and freely admit his guilt but if defendant wishes to spare himself the ordeal and embarrassment of trial by pleading guilty before trial his lawyer can prevent his doing so, and

this even though he cannot be compelled to accept a lawyer. The majority hold, in short, that defendant may assert his constitutional right to acknowledge his guilt, but only on the condition that he submit to the ordeal of a trial. This result is exceedingly strange, illogical, and inconsistent, particularly so because counsel's motives in refusing to give his consent may be varied. (See People v. Corona (1978) 80 Cal.App.3d 684, 702-704.)

As stated by Justice Frankfurter in Adams v. U.S. ex rel. McCann (1942) 317 U.S. 269, 276-277, "It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who

admits his guilt to stand trial against his own wishes . . . . And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice." (Italics added.)

In my opinion the state can assert no interest sufficiently compelling to override defendant's constitutionally protected freedom of choice in the matter of his own plea, so long as that plea is voluntarily and knowingly made, and has a sufficient factual basis (see Pen. Code, § 1192.5). To the contrary, given the overwhelming burdens on our crowded courtrooms, attributable in substantial part to the trial and retrial of numerous capital cases, the public interest is not served by refusing to accept such

pleas if properly made. The majority characterizes defendant's plea as motivated by a desire to "commit suicide." This rhetoric disregards the record which demonstrates that his competency to enter a voluntary and knowing plea was firmly established in several thorough psychiatric examinations and competency hearings.

In conclusion, I return to the high court's language in Faretta, where the rationale underlying the whole principle of self-representation is aptly expressed: "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of

the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." (P. 820, fn. omitted.)

I would affirm the judgment of conviction as to counts 1, 6, 7 and 10.

RICHARDSON, J.

I CONCUR:

CLARK, J.

A P P E N D I X "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAR 2 1981

I have this day filed Order

Appl for Stay.

DOCKET

In re: Crim. No. 21024

People

vs.

Chadd (Billy Lee)

Respectfully,

Clerk

72070-877 7-79 4M OSP

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT OF SERVICE BY MAIL

Clifford E. Reed, Jr., being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 110 West "A" Street, Suite 600, San Diego, California 92101; that on the 24 day of April, 19 81, affiant enclosed one true copy of the within

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT WITH SUBMISSION OF TYPEWRITTEN APPENDIX "A" (People v. Chadd)

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

That all parties required to be served have been served as shown below:

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FOR DELIVERY TO HON.
EARL H. MAAS, JR., JUDGE

Clifford E. Reed
CLIFFORD E. REED, JR.

Subscribed and sworn to before me this 24th day of April, 19 81.

Sheri Hatten
NOTARY PUBLIC in and for the County of San Diego, State of California.

SHERI HATTEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Nov. 7, 1981

SD CL-3 (11/78)
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